90-704

Supreme Court, U.S.
FILED
OCT 30 1990
JOSEPH F. SPANIOL
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

Is a litigant denied procedural due process when a state supreme court creates and retroactively applies an evidentiary requirement which is inconsistent with then-existing state evidence law?

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No. _____

In The

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SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,[1]

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Southern Bell Telephone and Telegraph Company, petitions the Court for a Writ of Certiorari to review the judgment of the South Carolina Supreme Court.

[1] The South Carolina Public Service Commission ("PSC") was a respondent, along with Southern Bell Telephone and Telegraph Company, in the appeal to the South Carolina Supreme Court. The Public Service Commission did not participate in the petition for rehearing and is no longer a party.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 394 S.E.2d 311 (S.C. 1990), and is reprinted at App. 3a-9a. The order denying petition for rehearing by the South Carolina Supreme Court is unpublished at this time and is reprinted in Petitioner's appendix at pages 1a-2a.

JURISDICTION

The South Carolina Supreme Court entered judgment on May 7, 1990, and denied Petitioner's petition for rehearing on August 1, 1990. The jurisdiction of the court is invoked pursuant to 28 U.S.C. §1257. The question presented requires interpretation of the Due Process clause of the Fourteenth Amendment of the Constitution, which appears in Petitioner's appendix at page 40a.

STATEMENT

1. This is a case in which the South Carolina Supreme Court created and then applied retroactively a rule of evidence and thereby denied the Petitioner any opportunity to conform its evidence at trial before the PSC to the new rule. Southern Bell Telephone and Telegraph Company (Petitioner) filed with the South Carolina Public Service Commission (PSC) an application for an increase in its rates for Touch-Tone service on September 17, 1987. The State's Consumer Advocate (Respondent) intervened and was made a party of record. After a

hearing, an order was issued granting the proposed rate increase.

The proposed increase was actually a reallocation of revenues among services to offset losses Petitioner had alleged it would sustain under an earlier PSC ruling in another docket. The earlier ruling required all local exchange companies to offer multi-jurisdictional WATS access lines ("WALS") instead of separate intrastate and interstate WALS. The PSC order also provided that any local telephone companies that would have an intrastate revenue deficiency as a result of this requirement could file for a rate increase to offset the resulting revenue deficiency.

2. Thereafter, Petitioner filed to increase certain of its rates and charges as contemplated by the PSC's Order and the request was granted following an evidentiary hearing. At that hearing, Petitioner's expert offered his opinion as to the revenue loss anticipated by Petitioner due to the PSC's order concerning WATS access lines. The expert both discussed the study he relied upon and proferred his opinion, without objection, as to the anticipated loss. The PSC thereafter granted the increase. Respondent challenged the granting of the rate increase for Petitioner by petitioning for judicial review on April 20, 1988, in accordance with the state Administrative Procedures Act, §§1-23-310 through §1-23-400, *S.C. Code* Ann. (Law. Co-op. 1976). Following affirmance of the PSC by the circuit court, Respondent file an appeal in the South Carolina Supreme Court.

On May 7, 1990, the South Carolina Supreme Court reversed the circuit court by applying retroactively a

newly created rule of evidence. The court's reversal hinged upon its finding that the Petitioner had not introduced into evidence the actual study relied upon by the expert for Petitioner in estimating the revenue loss which would be incurred by Southern Bell due to the PSC's previous order.

3. Petitioner sought rehearing of the South Carolina Supreme Court's opinion by petition of May 17, 1990. In its Petition for rehearing before the South Carolina Supreme Court, Petitioner asserted that, "to allow the decision, *sub judice*, to stand, in essence creates a new rule of law which denies a litigant's procedural due process rights . . . ". App. at 42a. Rehearing was denied on August 1, 1990, without reference to this assertion.

REASONS FOR GRANTING THE WRIT

A. State Evidence Law

The South Carolina Supreme Court's ruling is contrary to well established evidence law in the state.[2] Moreover, it was given retroactive effect, without remand, thus depriving the Petitioner of any opportunity to conform its evidence to the new rule. It is wholly inconsistent with previously existing South Carolina evidence law and amounts to a denial of Petitioner's rights to procedural

[2] Aside from certain specific statutory provisions, §19-1-10 through §19-21-60 *S.C. Code* Ann. (*Law Co-op*, 1976), none of which are applicable here, and § (m) of Rule 43, S.C.R.C.P. which adopted the essence of federal Rule 703 as of July 1, 1990, South Carolina evidence law is not codified but is based on the common law. *See e.g., S.C. Dept. of Soc. Services v. Doe*, 355 S.E.2d 543 (S.C.App. 1987).

due process under the Fourteenth Amendment of the United States Constitution, *U.S. Const. amend. XIV* §1.

The state supreme court found that the PSC record was deficient because it did not contain the actual study referred to by the Petitioner's expert in concluding that prospective losses would indeed occur as a result of the previous PSC ruling. Since the studies upon which Petitioner's expert based his testimony were not themselves admitted into evidence, the court concluded that the expert's opinion was without probative value. The court said, "Southern Bell failed to introduce any of the studies or data allegedly relied upon by its experts which served to demonstrate such entitlement". (App. at 4a.)

Typically, when the state supreme court has found an order lacking specificity of supporting facts, its past practice has been to remand to the PSC to provide the necessary basis for its findings of fact. The court did not remand in this case, however, stating that there was no factual basis of record to support the PSC's findings.

This determination of inadequacy was advanced as follows: "This 'study' referred to by Mr. Payne was never introduced into evidence before the PSC. We have previously held in similar circumstances the record is inadequate in such an instance." (App. at 8a.)

The court's language notwithstanding, *no* precedent exists to support its action.[3]

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[3] The court cited *Parker v. South Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 314 S.E.2d 597 (1984) for the view that

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While the new requirement imposed by the supreme court in this case is unusual and has never been applied in the past, the purpose of this petition is not to question the wisdom of the rule. Rather, the purpose here is to challenge the means by which it was first imposed, and to remedy the irreparable harm to the Petitioner.

The novel requirement herein is a radical, unexpected, and unfounded departure from South Carolina evidence law. The accepted rule is that in order for an expert's opinion to have probative value, the factual underlying basis must be identified in the record. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 188 S.E.2d 841 (1972). This does not mean that the expert must set forth his calculations or detail the scientific or professional knowledge leading to his conclusions. *Young*, 242 S.E. 2d at 678.

South Carolina evidence law relating to the basis for expert opinion was liberalized in 1986, prior to the trial of this case, to allow expert opinion to be based partially on information received from others, even though the information itself may not be admissible, if such facts and data "are of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon

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opinions of experts are of no probative value absent an evidentiary showing of the facts supporting the opinion. *Parker* does not, however, require that studies, reports, or other resources commented upon or relied upon by an expert be admitted into evidence. It simply requires that a factual foundation for the opinion be set out in the record.

the subject." *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986).

As a result of *Howle*, the South Carolina rule on expert testimony was generally brought into line with the more liberal Rule 703, of the Federal Rules of Evidence. This rule more realistically reflects the way experts actually function in developing opinions in their fields of endeavor outside the courtroom. *See, e.g., United States v. Aluminum Co. of America*, 35 F.Supp. 820 (S.D.N.Y. 1940).

Thus, at the time the state supreme court issued its ruling in this case, the evidence law of South Carolina relating to expert witnesses: (1) required that the record reflect the factual foundation upon which the opinion is based; (2) permitted expert testimony based upon firsthand knowledge of the facts supporting the expert's opinion; (3) absent firsthand knowledge of facts, permitted expert testimony via hypothetical question; and, (4) permitted expert testimony based upon information received from outside sources, even though those sources may be inadmissible as hearsay.

The substantive change in the rule of evidence announced in this case, however, requires for the first time that in order for an expert's opinion to have probative value, the outside sources upon which he commented or relied must be introduced into evidence.

When an expert offers an opinion which involves comment or reliance upon a study, whether his own study or that of another, the evidence of interest is the opinion testimony, not the outside source material. Thus, the expert testimony will be a conclusion which is based upon or extrapolated from results reported in a study.

Petitioner's expert, Mr. Payne, supervised preparation of the study and it is his opinion testimony, extrapolated from and based upon the study, which Petitioner placed in the record.[4]

The threshold probative value requirements of *Young* and *Parker* were met by Mr. Payne's testimony of facts and assumptions in support of his opinions. South Carolina evidence law, prior to the court's action in this case did not require that the study on which Mr. Payne commented be admitted into evidence. Indeed, there was no objection to Mr. Payne's opinion when offered.

As a result of the court's imposition of a wholly new substantive rule of evidence for the basis of expert testimony at the end of the appellate process, *without remanding,* Petitioner has been denied its right to procedural due process of law.[5] The ratemaking process was conducted

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[4] Under *Howle,* Mr. Payne even could have offered an opinion based on a study prepared by someone else, even though the study itself would have been inadmissible, so long as it was of a kind upon which one might reasonably rely.

[5] The Respondent, in reliance upon the State Supreme Court's Order, has announced its intent to seek from both the state courts and the PSC an order requiring the Petitioner to refund almost ten million ($10,000,000.00) dollars to its ratepayers. Respondent's actions are based solely upon the opinion of the South Carolina Supreme Court from which this appeal is sought. Upon the reversal of the South Carolina Supreme Court's retroactive application of a newly-created rule of evidence, the basis of Respondent's attempts to obtain a refund of these revenues will be voided. If such a refund is obtained, the Petitioner would have no means by which it might recoup these revenues due to the well-established ban on retroactive

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under the State Administrative Procedures Act pursuant to the same rules of evidence as are applied in trial courts in South Carolina. *See, S.C. Code* Ann. § 1-23-330 (*Law. Co-op*, 1976, as amended). At no time prior to the issuance of the state supreme court opinion on May 7, 1990, did Petitioner have any notice of a change in the rule of evidence relating to the basis for expert testimony. Rather, it knew only that the rules of evidence as applied in circuit court would govern its conduct at trial.[6]

It is the function of courts to interpret rules and to craft new rules where justice demands. When a new rule is instituted in the final stage of the appellate process as here, however, the case should be remanded for conduct of proceedings in accordance with the new rule. Since that was not done in this case, Petitioner has been denied procedural due process under the Fourteenth Amendment of the Constitution.

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ratemaking, even though the revenues were collected during the state court appeals process under a lawful tariff, which was not stayed by any party. (*See, e.g,* as to retroactive ratemaking, *South Carolina Electric and Gas Co. v. Public Serv. Com'n*, 272 S.E.2d 793, 795 (S.C. 1980); as to collecting revenues under a lawful tariff, *see, S.C. Code* Ann. § 58-9-230 (*Law. Co-op*, 1976, as amended); as to impact of failure to obtain a stay during the appeals process, *see e.g., Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill.2d 205, 117 N.E.2d 774 (1954).

[6] Moreover, the Consumer Advocate did not even raise this evidentiary issue in its brief and, as such, it should not have even been reached by the state supreme court. *Shipman v. DuPre, et al.*, 222 S.C. 475, 73 S.E.2d 716 (1952); *see also, Langley v. Boyter*, 325 S.E.2d 550, 561 (S.C.App. 1984); *rev'd on other grounds*, 332 S.E.2d 100 (S.C. 1985).

B. Due Process

The protections against denial of due process rights afforded by the Fourteenth Amendment have been long recognized and widely accepted. In *Ex Parte State of Virginia*, 100 U.S. 339, (1880) the Supreme Court recited the scope of protection:

> They [the prohibitions of the Fourteenth Amendment] have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

100 U.S. at 346, 347 (1880).

The state supreme court ruling has deprived Petitioner of these important, well protected rights through the court's failure to apply existing law and its retroactive imposition of a new evidentiary requirement. This denial of due process occurred when the state supreme court

reversed the lower court based on Petitioner's non-compliance with a previously non-existent evidentiary requirement and did not allow Petitioner the opportunity to conform its evidence to this rule. It is the retroactivity of the state court ruling which forms the core of the denial of Petitioner's right to due process.[7]

Novel procedural requirements cannot be permitted to thwart review in the Supreme Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. *National Ass'n for A. of C.P. v. State of Alabama,* 357 U.S. 458 (1958). The basic due process concept is that an unforeseeable and unsupported state court decision on a question of both state procedure and a substantive rule of evidence does not constitute an adequate ground to preclude Supreme Court review of a federal question. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right. *Bouie v. City of Columbia,* 378 U.S. 355 (1964).[8]

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[7] Although protection against legislative enactment of criminal laws with retroactive effect is contained in the *Ex Post Facto Clause* of the Constitution. U.S. Const. Art. 1 § 10, *see e.g., Frank v. Mangum,* 237 U.S. 309 (1915) and *Marks v. United States,* 430 U.S. 188 (1977), the Federal guaranty of due process extends in civil cases also to state action through its judicial branch as well. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930).

[8] The Supreme Court held in *Bouie,* a criminal case, that Petitioner was denied due process when the South Carolina

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When the sovereign has established substantive rules to govern its own conduct, it will be held to the self-imposed limitations on its own authority, departure from which denies procedural due process of law. *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970), (citing *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969)). An agency of government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. *Heffner*, 420 F.2d at 813. Due process questions under the federal Constitution may be presented either by the failure of the state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process. *Field v. Boyle*, 503 F.2d 774, 779, n. 6 (7th Cir. 1974) (citing *Flood v. Margis*, 461 F.2d 253 (7th Cir. 1972)). Basic notions of fair play and justice require that no person shall be made to suffer for a breach unless standards of behavior have first been announced. *Sullivan v. Houston Indep. School Dist.*, 307 F.Supp. 1328 (S.D. Tex. 1969). Clearly such notions of fair play and justice are even more applicable when the denial of a constitutional right is inflicted by the judicial branch of government.

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Supreme Court departed from a well established interpretation of a criminal trespass statute and imposed a new interpretation of the statute. In the case *sub judice*, the court did not merely change its interpretation of a rule of evidence, it created an entirely new rule and, without notice, applied same to the Petitioner.

Petitioner maintains that the state supreme court denied Petitioner's right to due process by not following the state's evidence rules and, instead, reversing the lower court's decision because Petitioner had not complied with an as yet unannounced rule. While the new rule may be illogical and contrary to recognized principles of evidence law, Petitioner nonetheless could have complied if only the state supreme court had allowed it the opportunity upon remand in accord with its usual practice in such cases.

It is generally accepted that the Supreme Court cannot treat a mere error of state law as a denial of due process in every instance and that the misapplication of state law, whether evidentiary or substantive, does not alone constitute a denial of due process. *Gryger v. Burke,* 334 U.S. 728 (1948). The Due Process Clause does not guarantee that every decision reached will be factual or just, but it does guarantee that a decision will be reached by processes that are fair. *U. S. v. Wallace,* 448 F.Supp. 164 (E.D. Va. 1978).

In this case, however, the issue is not mere error in the decision by the South Carolina Supreme Court. Rather, the issue is the very process by which the state supreme court failed to follow its own well understood rule of law and issued instead a new evidentiary rule of law terminating Petitioner's rights. Under the Constitution, Petitioner has a due process right to have legal proceedings before administrative agencies conducted in accordance with the state's own rules governing evidence and to have advance notice of changes which affect its Constitutional right to due process. The state supreme court's ruling has seriously eroded that right by

imposing a new evidentiary requirement and terminating the case without remanding it for further proceedings in accordance with the new rule.

CONCLUSION

As this newly-created rule of evidence served as the sole basis for the state supreme court's action, it is apodictic that absent its retroactive application the lower court's ruling in support of the PSC's finding would have been affirmed. At a minimum, upon remand, the Petitioner could comply with the newly created rule and introduce into evidence the actual documents relied upon by Petitioner's expert in formulating his opinion.

Respectfully submitted,

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October 30, 1990

APPENDIX

(SEAL)

The Supreme Court of South Carolina

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August 2, 1990

Fred A. Walters, Esquire
Southern Bell Telephone and
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1600 Hampton Street
Columbia, S.C. 29201

Re: Steven W. Hamm v. Southern Bell Telephone and Telegraph Company and The South Carolina Public Service Commission

Dear Mr. Walters:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/ George T. Gregory, Jr. C.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A.J.

Associate Justice Jean H. Toal
not participating

August 1, 1990."

The remittitur in this matter is today being sent to the Clerk of Court for Richland County.

Sincerely yours,

/s/ Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

Petition Denied

s/ George T. Gregory, Jr. C.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A.J.

Associate Justice Jean H. Toal not participating

August 1, 1990

STATE OF SOUTH CAROLINA
In the Supreme Court

Steven W. Hamm, Consumer Advocate for the State of South Carolina, Appellant,

vs.

Southern Bell Telephone and Telegraph Company and the South Carolina Public Service Commission, Respondents.

Appeal from Richland County
Ernest Kinard, Jr., Judge

Opinion No. 23214
Heard January 22, 1990 – Filed May 7, 1990

REVERSED

Steven W. Hamm, Raymon E. Lark and Natalie J. Moore, all of the South Carolina Department of Consumer Affairs, of Columbia, for appellant.

Fred A. Walters, of Southern Bell Telephone and Telegraph company; and Marsha A. Ward, of South Carolina Public Service Commission; and A. Camden Lewis, of Lewis, Babcock, Pleicones and Hawkins; all of Columbia, for Respondents.

TOAL, A.J.: In this appeal the Consumer Advocate contests the validity of an approved rate increase for

Touch-Tone dialing telephone rates requested by Southern Bell Telephone and Telegraph Company. We reverse.

FACTS

This case involves three separate orders of the Public Service Commission (PSC). The Consumer Advocate (Advocate) participated in each of the hearings leading to the three orders.

In Order No. 87-982, the PSC mandated that all local exchange telephone companies must offer multi-jurisdictional WATS lines services, as opposed to separate intrastate and interstate WATS lines. This order also noted that local telephone companies may suffer an intrastate revenue deficiency as a result of the decision. Finally, the order directed that, if a company should suffer a loss, it should seek approval of rate increases to offset that loss, provided that such rates affect optional services only and not local basic exchange services.

Southern Bell Telephone and Telegraph Company (Southern Bell) filed for a rate increase for its Touch-Tone calling services in order to offset an alleged loss caused by Order No. 87-982. The proposed rate increase would generate $4.2 million in revenues for Southern Bell. In Order No. 88-137, the PSC approved the rate increase application in the amount of $3 million. However, the PSC failed to make a specific finding that Southern Bell had sufficiently demonstrated entitlement to a rate increase. Moreover, Southern Bell failed to introduce any of the studies or data allegedly relied upon by its experts which served to demonstrate such entitlement.

The Advocate petitioned for a rehearing and reconsideration of Order No. 88-137. One ground asserted by the Advocate for reconsideration was that "there was no underlying evidentiary support in the record" demonstrating Southern Bell's anticipated loss. (*See* Tr. 24). The PSC then issued Order No. 88-283, in which it attempted to more comprehensively address the issues involved in Order No. 88-137. The PSC pointed to certain testimony in support of its view that Southern Bell had sufficiently demonstrated that it would suffer a loss at least commensurate with the $3 million approved rate increase.

The Advocate next sought judicial review and a reversal of the latter two PSC orders. The Circuit Court affirmed the PSC orders and the Advocate timely appealed.

LAW/ANALYSIS

The Advocate argues, *inter alia*, that the Circuit Court should be reversed because the PSC erred in approving a rate increase based on speculative, unsubstantiated losses rather than proven ones. We agree.

In Order No. 88-137, the PSC notes that the Advocate presented one Mr. Buckalew as an expert who opined that Southern Bell's losses were speculative. Next, the PSC states, "[c]ompany witness Payne gave rebuttal testimony concerning allegations made by Mr. Buckalew during his testimony in the proceeding. Specifically, witness Payne's testimony addressed Mr. Buckalew's allegations concerning revenue losses . . . " (Tr. 20). In its "Findings and conclusions" in Order No. 88-137, the PSC recited simply that Southern Bell's requested rate increase should be

approved. In Order No. 88-283, the PSC's order reconsidering Order No. 88-137, there is merely a repetitive finding that there was factual support in the testimony of Mr. Payne which demonstrated Southern Bell's losses.

As an initial matter, these "findings" by the PSC run afoul of our decision in *Able Communications, Inc. v. South Carolina Public Service Comm'n*, 290 S.C. 409, 351 S.E.2d 151 (1986). We stated in *Able Communications, Inc.* that "[t]he findings of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." 290 S.C. at 411, 351 S.E.2d at 152. We further noted there that "[w]here material facts are in dispute, the administrative body must make specific, express findings of fact." *Id.* Finally, we specifically held there that, "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." *Id.* No more than a recital of testimony and a general conclusion exist here.

The Advocate would have us go further and hold that as a general rule the PSC is without authority to adjust a rate based on proven and measurable changes to occur in the future.[1] The Advocate takes the position that, when making a rate adjustment, the PSC must only consider historical data. We reject this argument, as we can imagine contexts in which it would be entirely inappropriate for the PSC to refuse to consider a future event

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[1] The losses allegedly "demonstrated" by Southern Bell's experts were anticipated losses and had not at the time actually been suffered by Southern Bell.

when adjusting rates.[2] Moreover, in *Southern Bell v. The Public Service Commission*, 270 S.C. 590, 244 S.E.2d 278 (1978), we approved the historical test year as a basis for calculating a utility's rate base, as long as adjustments were made for any *known* and *measurable out-of-period* changes in expenses, revenues and investments which would materially alter the rate base.

It has been past practice to remand cases which violate our rule in *Able Communications, Inc.* in order for the PSC to point to the specific factual basis of record for its findings of fact. Here, however, a remand is not necessary as there is no factual basis of record to which the PSC may point in support of its findings. "A commission is generally given a wide range of discretion in utility rate cases, however, that discretion cannot be exercised without a factual basis to support the commission's decision." *Hamm v. South Carolina Public Service Commission*, 295 S.C. 429, 431, 368 S.E.2d 911, 912 (1988). *See also Parker v. South Carolina Public Service Commission*, 280 S.C. 310, 313 S.E.2d 290 (1984).

Here, the record merely includes the conflicting opinion testimony of the experts for Southern Bell and the Advocate. Southern Bell's expert, Mr. Payne, based his opinion that Southern Bell would suffer future losses on "a very extensive, conservative study . . . performed to quantify the financial impact on Southern Bell's South

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[2] We note that, under the Advocate's proposed rule, the PSC could not consider, *inter alia*, the future effective date of a court ruling; the known promulgation of new regulations not at the time effective; or an agreement to lift an embargo or tariff affecting rates, in deciding whether to *lower* rates.

Carolina intrastate operations resulting from changes to current commission policy for WATS service." (Tr. 83, ll. 12-17). This "study" referred to by Mr. Payne was never introduced into evidence before the PSC. We have previously held in a similar circumstance that the record is inadequate in such an instance.

In *Parker v. South Carolina Public Service Commission*, 281 S.C. 215, 314 S.E.2d 597 (1984), the PSC was to make a factual determination of a depreciation rate for rate making purposes. As in this case, the only "evidence" before the PSC on the issue was the opinion testimony of some witnesses. We held there that, "[w]hile witnesses give their *opinions* that a four percent depreciation rate was reasonable for rate making purposes, these opinions are of no probative value in view of the fact that there is no evidentiary showing of the facts upon which the opinion is predicated." (Emphasis in the original). *Id.*, 281 S.C. at 217, 314 S.E.2d at 599. The same analysis and ruling apply in this case. There being no factual basis of record for the PSC's finding that Southern Bell would suffer future losses, we are constrained to rule that the lower court's judgment is **REVERSED**. We need not reach and thus express no opinion on the remaining issues presented.

GREGORY, C.J., HARWELL, CHANDLER and FINNEY, JJ., concur.

STATE OF SOUTH CAROLINA JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND (Filed June 5, 1989)

Common Pleas COURT CASE NO. 88-CP-40-2085

Steven W. Hamm vs Southern Bell Telephone & Telephone Company, et al.

Plaintiff(s) Defendant(s)

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the verdict rendered.

[✔] Decision by court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[✔] Action Dismissed. [ ] Rule 12(b), SCRCP [ ] Rule 40(c)(3), SCRCP
[ ] Rule 41(a), SCRCP (Vol. Nonsuit) [ ] Settled
[ ] Other, Explained: _____

IT IS ORDERED AND ADJUDGED: [✔] See attached order
[ ] Statement of Judgment by court

Dated at COLUMBIA, South Carolina,
this _____ day of _____, 19 ___.

_____
Judge

This judgment was entered on the ___ day of _____, 19 ___, and a copy mailed first class this 5

day of June, 1989, to attorneys of record or to parties (when appearing *pro se*) as follows:

/s/ Raymon E. Lark, Jr.	/s/ Marsha A. Ward
Attorney(s) for Plaintiff(s)	Attorney(s) for Defendant(s)

/s/ Barbara A. Scott by
Clerk of Court

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS DOCKET NO. 88-CP-40-2085
Steven W. Hamm, Consumer Advocate for the State of South Carolina, Petitioner, vs. Southern Bell Telephone and Telegraph Company and the South Carolina Public Service Commission, Respondents.	)	ORDER (Filed June 2, 1989)

This is an appeal by the Consumer Advocate of the State of South Carolina from Orders of the South Carolina Public Service Commission. For the reasons set forth below, I affirm the actions of the P.S.C. As the factual background which gave rise to this matter is somewhat complicated, a brief recitation of the procedural background of this case is necessary.

BACKGROUND

On or about September 17, 1987, Southern Bell Telephone and Telegraph Company (hereinafter "Southern Bell" or "Company") filed with the South Carolina Public Service Commission (hereinafter "PSC" or "Commission") proposed revisions to its General Subscriber Services Tariff whereby it sought both to increase the

monthly charge for "Touch-Tone" service and to establish a minimum and a maximum rate structure therefor.

This filing was made in response to Commission Order No. 87-982 in Docket No. 87-29-C issued on September 4, 1987. In Order No. 87-982, the PSC had considered the issue of whether or not the present requirement of Southern Bell's customers utilizing separate intrastate and interstate access lines for Wide Area Telephone Service, or "WATS," should be allowed to continue. Having heard testimony that the then-existing policy should be abolished, and agreeing therewith, the Commission expressly noted that local exchange companies anticipating a reduction in revenue as a result of their decision could file for increases in rates, " . . . provided that such rates shall affect optional services only and shall not affect local basic exchange rates." Order No. 87-982 at p. 4.

Following publication in the *State Register* of Southern Bell's filing made in response to Docket 87-29-C, a hearing was held before the full Commission on January 13, 1988. Natalie J. Moore, Esq. represented the Consumer Advocate, Fred A. Walters, Esq. and Len S. Anthony, Esq. represented Southern Bell and Marsha A. Ward, Esq. represented the Commission Staff.

Testimony was accepted from four witnesses during the case in chief and Southern Bell offered the testimony of a fifth witness in rebuttal to the testimony offered by the witness sponsored by the Consumer Advocate. In all, a record of eighty-seven (87) pages was compiled.

On February 15, 1988, the Commission issued its Order number 88-137 whereby Southern Bell's proposed

increase in its rates for TouchTone service was approved. The PSC, however, denied the Company's request for flexibility to price this service within a range of an established minimum and maximum rates.

The Consumer Advocate timely filed its Petition for Rehearing and Reconsideration wherein it alleged three errors on the part of the Commission: (1) The Commission erred in granting an increase in rates due to the lack of evidentiary support for that increase; (2) The Commission erred in granting an increase affecting the general body of ratepayers in violation of *Code* section 58-9-520; and (3) The Commission erred in granting an increase because TouchTone is not an optional service and therefore, an increase violated the PSC's previous Order establishing this docket.

On reconsideration, the Commission acknowledged that it had failed to make a specific finding as to whether or not TouchTone is optional. It then reviewed the record and expressly found, at page 2 of its Order No. 88-283 that " . . . touchtone (sic) calling service is optional." Having made that finding, the PSC rejected the arguments of the Consumer Advocate in all other particulars.

This appeal followed by service by the Consumer Advocate of a Summons, Notice of Intent to Appeal and a Petition for Judicial Review upon parties of record. Service was effective as to Southern Bell and the PSC on or about April 20, 1988. In its pleadings the Consumer Advocate set forth, in essence, four grounds of reversible error: (1) The decision was not supported by the evidence of record; (2) That in setting rates the Commission

departed from its practice of setting rates based on historic test period data; (3) That *Code* section 58-9-520 was violated in that the Company failed to file a thirty-day notice of intent; and (4) That the Commission cannot approve an increase for one service without examining all aspects of the Company's revenues and expenses as allegedly required by *Code* sections 58-9-570 and 1-23-380(g)(1).

Southern Bell and the PSC filed separate answers, each of which expressly denied the assertions of the Consumer Advocate that the Orders of the Commission violated the statutory and common laws of this State. In addition, Southern Bell filed its Motion for Partial Summary Judgment as to that portion of the Consumer Advocate's appeal which alleges violations of *Code* sections 58-9-570 and 1-23-380(g)(1) on the grounds that the Consumer Advocate failed to raise these grounds in its Petition for Reconsideration at the administrative level and is, therefore, barred from asserting such grounds at the Circuit Court as per *Code* sec. 1-23-380(a). As the matter was heard on the merits by this Court on April 24, 1989, that Motion is denied and the issue raised thereby will be addressed herein.

STANDARD OF REVIEW

An appeal from an action of the P.S.C. is governed by the provisions of both Title 58, *S. C. Code* and the Administrative Procedures Act. *Code* sec. 1-23-10, *et seq. Lark v. Bi-Lo*, 276 S.E.2d 304 (S.C. 1981). *S.C. Code* section 1-23-380(g), 1976, as amended, of the Administrative Procedures Act provides:

* * *

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarraned [sic] exercise of discretion.

In *Lark v. Bi-Lo*, the Court held that the Administrative Procedures Act, as set forth above, established the "substantial evidence rule" as the standard for judicial review of agency decisions. Id. at 305. The decision of an administrative agency, then, must be sustained if there is substantial evidence to support it. In upholding an order of the Commission in *Palmetto Alliance v. P.S.C.*, 319 S.E.2d 695, at 696 (S.C. 1984), the Supreme Court stated:

"Substantial evidence" is not a mere scintilla of evidence nor evidence viewed blindly from one

> side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. . . . Substantial evidence is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Ellis v. Spartan Mills*, 276 S. C. 216, 177 S.E.2d 590 (1981). A judgment upon which reasonable men might differ 'will not be set aside.'

The Consumer Advocate has the burden of proving convincingly to this Court that the Order of the Commission is unsupported by evidence or embodies arbitary [sic] or capricious action as a matter of law. *Greyhound Lines, Inc. v. South Carolina Public Service Commission*, 262 S.E.2d 18 (S.C. 1980).

In the case below, the Consumer Advocate was able to engage in a full adversarial proceeding before the Commission. The Commission had a complete and full opportunity to weigh the evidence and the testimony and ascertain the credibility of all witnesses.

The Supreme Court has consistently stated that the Commission "is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited." *Hamm v. South Carolina Public Service Commission and Motor Truck Rate Bureau, Inc.*, 344 S.E.2d 600 (S.C. 1986); *GTE Sprint Communications Corporation v. The Public Service Commission of South Carolina, et al.*, 341 S.E.2d 126, 128, 129 (S.C. 1986); *Patton v. South*

Carolina Public Service Commission, 312 S.E.2d 257, 259 (S.C. 1984); *Southern Bell Telephone and Telegraph v. South Carolina Public Service Commission*, 244 S.E.2d 278, 282 (S.C. 1978). Indeed, the presumption of expertise has been addressed directly by our Supreme Court. Quoting with approval from *State, ex. rel. Utilities Commission v. General Telephone Company of the Southeast*, the Supreme Court has stated:

> . . . the Commission is a body of experts 'composed of men of special knowledge, observation, and experience' in the field of regulation. . . . Without any intent to question the correctness of such statement as to the experience and abilities of the Commission or to claim expertness for the courts, this is not the reason for the rule. The rule applies to the newly appointed, inexperienced commissioner, sitting on his first general rate case, as truly as it does to the veteran and, should the veteran be transferred from a seat on a commission to a seat on the reviewing court, he loses immediately the preferential status given by this rule to his views of the matter. The reason for that status is not expertness in fact, but the circumstance that the Commission is the delegatee of the power, of the Legislature. 189 S.E.2d at 739.

Southern Bell Tel. & Tel. v. Public Service Commission, 244 S.E.2d 278, 282 (S.C. 1978).

Further, it is well established that this Court cannot substitute its judgment for that of the Commission "upon a question as to which there is room for a difference of intelligent opinion." *Palmetto Alliance, supra*, citing *Chemical Leaman Tank Lines, Inc. v. South Carolina Public Service Commission*, 189 S.E.2d 296, 298 (S.C. 1972).

To carry its burden, the Consumer Advocate must prove that the Commission's decision is "clearly erroneous in view of the substantial evidence in the whole record." *Patton v. P.S.C.*, 312 S.E.2d at 259. The court has indicated that the burden assumed by the Plaintiff is a heavy one. *See, Lark*, 276 S.E.2d at 307. In *Lark*, the Court stated that reversal for lack of substantial evidence is limited to those cases "where a manifest or gross error of law has been committed by the administrative agency." *Id.* Having reviewed the record in this case and having heard the oral argument of the parties, it is clear that the Consumer Advocate has failed to meet its burden of proving any such error. The evidence of record, the statutory scheme of regulation and the PSC's views thereof support the action below.

DISCUSSON [sic]

The Consumer Advocate first argues that Orders numbered 88-137 and 88-283 should be set aside " . . . when the uncontraverted evidence of record shows that the Company was unable to prove any loss . . . " of revenues by virtue of the action of the Commission in the Docket number 87-29-C.[1] In the words of the Petition, "Witnesses for the Company testified that a loss had occurred since January 1, 1988, but they were unable to quantify this alleged loss when asked to do so repeatedly on cross-examination." Petition, paragraph eight.

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[1] The Consumer Advocate restates this argument at paragraph twelve (12) of his Petition where he states that irreparable harm will be incurred by the consuming public due to the lack of evidentiary support for the PSC's decision.

There is no dispute that Southern Bell's witness Payne was unable to respond to the questions asked by the Consumer Advocate related to the "actual loss" incurred by the Company as of January 1, 1988. Tr. pp. 84-85. To focus solely on that exchange, however, would be incorrect. Indeed, in accepting Southern Bell's evidence as to the anticipated revenue loss, the PSC recognized, implicitly, the irrelevance of this cross-examination.

This proceeding had its genesis in a prior docket, 87-29-C, wherein the Commission adopted a policy contrary to Southern Bell's then-existing methodology of providing WATS access lines.

Having heard the testimony in that Docket, the Commission ordered, "That the local telephone companies who *will* have an intra-state revenue deficiency . . . " (emphasis added) may file for a rate increase for other services.[2] Order No. 87-982 at p. 4. No appeal was taken by the Consumer Advocate from that Order.

In response thereto, Southern Bell filed for an increase in TouchTone rates. As explained at trial by witness Sims:

> In Southern Bell's testimony in Docket No. 87-29-C, a revenue shortfall of $4.2 million was

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[2] That "prospective" decision was discussed by Southern Bell witness Payne on rebuttal: "It would therefore be improper if Southern Bell were not allowed to maintain a revenue stream that contributes to the maintenance of reasonably affordable local exchange rates." Tr. pp. 82-85; *See, also, Parker v. PSC*, 314 S.E. 2d 148, 149 fn.1 (S.C. 1984).

> estimated. In an effort to be conservative, however, our proposed TouchTone Tariff is structured to generate approximately $3 million. We consider the $3 million that would be generated to be a fair and reasonable amount. Tr., p. 13.

No questions were asked of this Southern Bell witness by the Consumer Advocate. Tr. p. 17. Counsel for the Commission, however, pursued the point:

> Q. Mrs. Sims, your revenue shortfall, you projected, is that a projection or is that supported by any studies?
>
> A. There was a study presented in the multijurisdictional WATS docket that I think was fully discussed, and I agree with this study and I think it accurately portrays what we will actually lose, which is $4.2 million. . . . Now, the $4.2 million, this is based on some factual data that we have at this time based on the revenues that we've received . . . But it's not a forecast; it's what we're actually receiving at this time and that we do feel like we will lose this revenue.

Tr., pp. 18-19.

On rebuttal to the Consumer Advocate's witness, Southern Bell's witness Payne addressed the very issue the Consumer Advocate asserts is not in the transcript, *i.e.* the validity of the revenue figure proffered by the Company:

* * *

> Q. Mr. Buckalew states on page 5, lines 4 through 6 of his testimony that "Although Southern Bell claims that it may have a revenue deficiency of $4.3 million, that estimate is based on conjecture and not a real revenue deficiency." Is Mr. Buckalew correct?

A. No. As I stated in my original testimony (page 5, lines 22-25 and page 6, lines 1-14) the WATS and 800 service access line revenue loss was based on the fact that WATS/800 customers will have the incentives to replace their intrastate OUT-WATS and 800 service access lines with the less expensive interstate WATS access line. Mr. Buckalew's allegation simply ignores the following facts:

– Interstate WALS are less expensive than intrastate WALS.

– Interstate WALS are less expensive than common lines.

– An extraction of toll usage in South Carolina indicates that over 3,000 business lines should convert to UWALS, if available.

– CCLC not billed on originating UWAL traffic.

– At least one IC is providing Bi-jurisdictional WATS-like service today, including the origination and completion of intraLATA traffic.

Based on the above listed facts, Southern Bell's study was based on reality and not "what-ifs" as alleged by Mr. Buckalew.
(Emphasis added)

Tr., pp. 77-78, *see, also,* pp. 82-83.

There is, then, clearly competent evidence of record that Southern Bell would incur a revenue loss of $4.2 million dollars as a result of the PSC's action in Docket 87-29-C and that the rates filed in the instant proceeding would produce, annually, approximately $3.0 million in additional revenues, to help offset that loss. Tr. p. 13. Given that testimony, this Court cannot find that the P.S.C.'s reliance thereon constitutes a "manifest or gross

error," *Lark, supra,* at 307. Having conducted the trial of this case and viewed the witnesses, the Commission's view of this evidence is controlling.

Next, the Consumer Advocate asserts, the Commission erred in allowing Southern Bell to increase rates for its TouchTone service without first incurring some period of actual revenue loss. The Court is at a loss to follow that reasoning. Not only is that position inconsistent with the Commission's Order number 87-982 in Docket 87-29-C stating that "Companies who *will* have an intrastate revenue deficiency . . . " could file any time with four months to recover that revenue; but such a position, if adopted would require Southern Bell to be unlawfully deprived of its property.

If, as the Consumer Advocate suggests, Southern Bell had to incur actual losses before it could come in and ask to recover monies taken away by the Commission in a companion docket, the Company could never recover those revenues due to the prohibition against retroactive ratemaking, *South Carolina Electric and Gas Company v. P.S.C.*, 272 S.E.2d 793, 795 (S.C. 1980), and due to the ever-present problem of so-called "regulatory lag." *See, e.g., Central Louisiana Elec. Co. v. P.S.C.*, 508 So. 2d 1361, 1366 (La. 1987).

Given that prohibition, the Commission exercised its rate allocation function in allowing Southern Bell to implement tariffs which, over the course of the future year, would produce additional revenues of approximately $3 million to offset an anticipated $4.2 million loss. The evidence exists in the record to support that prospective loss. Tr. pp. 77-78 *See: Parker v. PSC,* 314

S.E.2d 148 (S.C. 1984). And, given the presumed validity of the PSC's Orders and the Commissioners' status as presumed experts, the Order below simply should not be overturned because the Consumer Advocate believes his witness was more credible than those of the PSC and Southern Bell. *See Parker v. PSC*, 314 S.E. 2d 148 (S. C. 1984).

The Consumer Advocate next argues that the Commission acted arbitrarily and capriciously in setting rates without having first scrutinized historic revenues and expenses.[3] Petition at paragraph nine. To establish a rate as done in this case, the Consumer Advocate argues, constitutes " . . . an abuse of discretion in violation of *S. C. Code Ann.* section 1-23-350(g)(6)." This position is erroneous.

There is no dispute that in a "general rate case," the P.S.C. often utilizes an historic test period. The use of this historic test period was first sanctioned by our Supreme Court in another Southern Bell case reported at 244 S.E.2d 278 (S.C. 1978). Even in approving the use of historic data, however, the Court admonished the PSC to be sure that known and measurable changes were taken into account. *Id.* at 284; *See, also, Parker v. P.S.C.*, 313 S.E.2d 290, 292 (S. C. 1984), citing *Southern Bell, supra.* At argument, counsel for the Consumer Advocate advanced no

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[3] *Also, see, infra* at pp. 21-22, wherein specific examples are cited where the PSC has set rates and charges for individual services on numerous occasions without scrutinizing "historic revenues and expenses." There has been no departure from the PSC's historic manner in which it considers individual tariff filings, such as the one for TouchTone service.

authority for her position that there is a prohibition against utilizing forward-looking data in establishing rates.

Nonetheless, in the case at bar, it was not necessary for the Commission to establish a test period and review volumes of historical financial data. Rather, having approved a new policy in Docket 87-29-C which would cost Southern Bell over $4.2 million annually, it allowed Southern Bell to file a rate to recover approximately $3.0 million over the course of the coming year.

At no point during the trial of the case below did anyone challenge the propriety of the mathematics leading to witness Sims' computation of the $3.0 million annual revenue figure. Tr. pp. 13-14; 17; 19-20. In fact, the Commission staff's witness McDaniel testified in support of the proposed increase! Tr. p. 69. Yet, again, the Consumer Advocate wishes to substitute his views for that of the Commission.

The complexity of ratemaking has been oft-recognized by our Supreme Court, as has the fact that "ratemaking is not an exact science." *Parker, supra,* at 291. The Legislature has acknowleged the need for recognition of agency expertise. In fact, *Code* Sec. 1-23-330(4) expressly gives latitude to the Agency to utilize its "experience, technical competence and specialized knowledge" in evaluating evidence. The language of our sister State of Georgia's Court, in the context of utility ratemaking is persuasive:

> The process of setting rates is not required to follow any particular course, so long as the end result does not violate the "just and reasonable" requirement, as the United States Supreme

> Court has recognized in a federal rate-making case: "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. [Cits.] It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 287, 88 L.Ed. 333 (1943).

Allied Chemical Corp. v. Georgia Power Co., 224 S.E.2d 396, 399 (Ga. 1976).

I find no infirmity in the manner by which the PSC utilized other than historic data in reaching its decision. This docket cannot be viewed in isolation of Docket 87-29-C. There, the PSC established that utilities which anticipated a prospective loss of revenues could file within four months to increase other services to maintain the then-existing level of revenues. Such an offset is logical to the Court and is certainly within the discretion of the Commission.

The Consumer Advocate's next alleged ground for reversal centers around its interpretation of *Code* section 58-9-520. A reading of 58-9-520, however, shows clearly the error of the Consumer Advocate's position:

> Whenever a telephone utility desires to put into operation a new rate or tariff *which affects the telephone utility's general body of subscribers,* the telephone utility shall give the Commission not less than thirty days' notice of the intention to file . . . provided, however, a hearing shall not be required when the proposed rate or tariff is a proposal to institute or modify an offering or regulation that is not part of a general rate case . . . (emphasis added).

Prior to the amendment of *Code* sec. 58-9-520 in 1983, as set out above, Southern Bell was required to file a "thirty day" letter if it desired to make *any* change in *any* rate. See *Code* section 58-9-520 (1976). In 1983, that requirement was expressly limited to those instances involving *general rate cases* by the General Assembly. It is, then, around the issue as to whether or not this is as "general rate case" that the Consumer Advocate focuses a great portion of his appeal.[4]

In its decision in Docket No. 87-29-C, the Commission limited expressly those services from which utilities could seek increased revenues to those which did not affect basic telephone service. *Order* No. 87-982, Docket No. 87-29-C.

In challenging whether or not Southern Bell had violated that portion of the PSC's Order, the Consumer Advocate's witness asserted that " . . . 76% of Southern Bell's exchange customers would experience an increase in rates if touch-tone (sic) rates were increased." Tr. pp.

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[4] For a discussion, generally, of the rate allocation methodology employed by the PSC, *see, Parker v. P.S.C.*, 314 S.E. 2d 148, 159 fn. 1 (1984).

32-33. Notwithstanding that testimony and in an exercise of its Legislatively-bestowed expertise, the PSC found expressly that TouchTone service is optional and that this filing did not constitute a general rate case. Order No. 88-283 at pp. 1-2. The Commission's reasoning is self-explanatory and worthy of restatement:

* * *

> Based on the evidence of the record before the Commission, the Commission finds touchtone service is optional.
>
> Witness Sims compared touchtone (sic) service to such optional services as custom calling services and stated that touchtone (sic) was optional. Staff witness McDaniel stated that touchtone (sic) service was "less discretionary" in comparison to custom calling services, but did not go so far as to say it was not "optional."
>
> It is clear to the Commission, however, that the customer makes a choice to invest in the service by paying an extra charge for the service and investing in touchtone telephone eqipment. *The customer can receive basic telephone service at no additional charge through rotary dial service.* Based on the above, the Commission finds that touchtone calling service is an optional service.
>
> *Therefore, the Consumer Advocate's allegations that the increase affected the general body of subscribers and therefore violated the provisions of S. C. Code Ann., Section 58-9-520 (1976), as amended, is without merit.* This code section requires telephone utilities desiring to put into operation a new rate or tariff affecting the general body of subscribers to file a Notice of Intent with the Commission thirty (30) days prior to the filing of the proposed changes. *Because this is an optional tariff and does not affect the general body of*

> *subscribers as contemplated by the statute, the Company was not required to file a Notice of Intent with the Commission*. Moreover, the Company was permitted to file for an increase in an optional service pursuant to the Commission's decision in Docket No. 87-29-C. The Company's filing in the instant docket was a direct result of the Company complying with the Commission's Order in Docket No. 87-29-C, which would not require a Notice of Intent. (Emphasis Added)

Given the PSC's above-recited express consideration of its statutory regulatory scheme, the Court's attention is directed to the views of our Supreme Court in this regard. The clear and consistent interpretation by the agency charged with the administration of a statutory scheme is determinative of this point. *See, e.g., Billings v. Trusdell,* 321 U.S. 542, 64 S. Ct. 737 (1944); *Marchant v. Hamilton,* 309 S.E.2d 781 (S.C. App. 1983). As stated recently by Mr. Justice Harwell in the case of *William C. Logan & Associates v. Leatherman,* 351 S.E. 2d 146, 148 (S.C. 1986):

> Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons. *Faile v. South Carolina Employment Security Commission,* 267 S.C. 536, 230 S.E. 2d 219 (1976).

Clearly, then, the Consumer Advocate's position is flawed. The Commission, charged with the interpretation of its statutory regulatory scheme has defined "general rate case" in its Order below and this Court concurs with that view. The notice provision of *Code* section 58-9-520 is not applicable to the case at Bar.

Finally, the Consumer Advocate asserts that *Code* section 58-9-570, and in a companion fashion, section

1-23-380(g)(1), have been violated by virtue of the Commission's alleged failure to adhere thereto. At oral argument and by written Motion for Partial Summary Judgment, Southern Bell asserts that the Consumer Advocate is barred from addressing any alleged violation of 358-9-570.

From a review of the pleadings and the record herein, it is clear that at no time prior to the filing of its Petition did the Consumer Advocate assert that the aforesaid *Code* sections had been violated. Given that infirmity, it is clear that this issue is not properly before the Court as the existing administrative procedures were not exhausted by the Consumer Advocate. *See, e.g., Lominick v. City of Aiken,* 135 S. E. 2d 305 (S.C. 1964).

Even assuming the question of whether or not the Commission was required to follow the language of Sec. 58-9-570 is before the Court, the answer is again contrary to the Consumer Advocate's position. The Consumer Advocate's position is pinned to its belief that Southern Bell's filing in the docket below constituted a general rate case. It did not. (*See infra,* at pp. 17-19).

According to the Consumer Advocate, *S.C. Code* section 58-9-570 requires the Commission to expressly consider a telephone utility's rate base, required rate of return, expenses, revenue requirements and capital structure whenever it changes *any* of a telephone utility's rates. Not only does this argument ignore the broad, general regulatory powers of the PSC,[5], it is obvious from

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[5] The PSC has very broad, through [sic] not unbridled, powers in the area of consideration and control of telephone

(Continued on following page)

the past practices of the PSC, coupled with a careful reading of the regulatory scheme in South Carolina that such is simply not the case.[6] *Faile, supra,* dictates that the

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(Continued from previous page)

company rates, tariffs and services. In particular, the PSC is empowered to adjust rates on its own motion without any type of hearing. *See, Code* Sec. 58-9-510. It possesses powers greater than those specifically enumerated within the *Code* for the enforcement of telephone company orders. *See, e.g., Code* Sec. 58-9-820. It is given a further grant of general broad power by the Legislature under *Code* Sec. 58-9-830. Among the unenumerated powers possessed by the PSC under *Code* Sec. 58-9-820, is the power to carry out its orders, giving the PSC continuing jurisdiction to enforce earlier orders. In the instant matter the PSC has simply enforced its prior decision in Docket 87-29-C and granted offsetting revenues to Southern Bell to keep it whole. Beyond the legislature's grant of broad powers to the PSC in the area of regulation of telephone companies, the courts have also recognized the broad ambit of the PSC's Power:

> (1) The PSC posseses [sic] special expertise in the area of telephone company regulations. *See, GTE Sprint Communications Corporation v. The Public Service Commission,* 288 S.C. 174, 341, S.E. 2d 126 (1986);
>
> (2) The court has also noted that the PSC possesses such powers as can be reasonably implied from its general grant of powers under the *Code. See, City of Camden v. Public Service Commission,* 283, S.C. 380, 323 S.E. 2d 519 (1984);
>
> (3) The Court has held that any administrative order must be upheld if the Court can find any valid grounds to sustain that order. (*See, Hartzell v. State Board of Examiners in Psychiatry,* 274 S.C. 502, 265 S.E. 2d 265 (1980).

[6] Indeed, even without the statutory amendments of 1983, a simply [sic] reading of *Code* section 58-9-570 supports

(Continued on following page)

prior interpretation of that scheme " . . . is entitled to most respectful consideration."

As pointed out by counsel Southern Bell, in PSC Docket No. 86-304-C, Order No. 86-1081, the Commission established a rate for intraLATA long distance verification and emergency interrupt services. These proposed tariffs did not constitute a request by Southern Bell for a general rate increase and the Commission did not formally address all the factors set forth in *Code* Sec. 58-9-570 in determining the rate to be established for this service.

Similarly, in PSC Docket No. 86-299-C, the Commission approved modifications to Southern Bell's directory assistance, custom calling services and access service tariffs without expressly addressing Southern Bell's rate base, rate of return or overall revenue requirement. The Commission again authorized Southern Bell to increase its rates for directory assistance in Docket No. 86-633-C and again did not expressly address the elements set forth in *Code* Sec. 58-9-570. These actions by the PSC are

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Southern Bell's position. The statute upon which the Consumer Advocate has pinned this position of its case speaks of rates (plural) and does not say rate (singular). The use of the plural term is consistent with the position that *Code* section 58-9-570 speaks to general rate cases and that interpretation has been long followed by the PSC. *See, Faile, supra.*

further evidence of their consistent adherence to the statutory, regulatory scheme in South Carolina.[7]

In short, *Code* section 58-9-570 just does not apply to the case at Bar, even if it was properly before the Court.

IT IS THEREFORE ORDERED:

(1) That the Petition for Judicial Review is denied;

(2) That the Orders of the Public Service Commission issued in Docket 87-503-C are affirmed; and

(3) That the Consumer Advocate's request for prejudgment interest need not be addressed as such is rendered moot by the affirmance of the action of the P.S.C.

/s/ J Ernest Kinard, Jr.
John Ernest Kinard, Jr.
Judge, Fifth Judicial Circuit

Columbia, South Carolina
June 1st 1989

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[7] These same decisions were made without regard to any historic test period. Therefore, the Consumer Advocate's position that the setting of rates in the case at bar is a deviation from traditional ratemaking (Petition at paragraph 9) is incorrect. Indeed, the manner in which the TouchTone rates was approved is totally consistent with the Commission's past practices for individual tariff filings.

BEFORE

THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 87-503-C - ORDER NO. 88-137

February 9, 1988

IN RE: Request of Southern Bell Telephone and Telegraph Company for approval of revisions to its General Subscriber Tariff for Touch-Tone Calling Service (Tariff No. 87-127)	)))))))	ORDER GRANTING RATE INCREASE AND DENYING PROPOSED RATE STRUCTURE

I.

INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) by way of revisions filed by Southern Bell Telephone and Telegraph Company (the Company) on September 17, 1987 whereby the Company seeks revisions to its General Subscriber Tariff for Touch-Tone Calling Service. The Company is proposing to increase the monthly charge for Touch-Tone Calling Service and to establish a minimum and maximum rate structure for Touch-Tone Calling Service.

On October 5, 1987 the Commission's Executive Director instructed the Company to publish a prepared Notice of Filing and Hearing once a week for two consecutive weeks in newspapers of general circulation in the Company's affected service area. The Notice of Filing and

Hearing indicated the nature of the Company's Application and advised all interested parties of the manner and time in which to file the appropriate Pleadings. The Notice of Filing and Hearing also appeared in the *State Register*. Vol. 11, Issue No. 10, dated October 23, 1987. The Company furnished Affidavits evidencing compliance with the publication requirements.

Petitions to Intervene were filed by the Consumer Advocate for the State of South Carolina (the Consumer Advocate) and AT&T Communications (AT&T).

The hearing was duly commenced at 10:30 a.m. on January 13, 1988 in the Commission's Hearing Room, the Honorable Cecil A. Bowers presiding. Fred A. Walters, Esquire and Len S. Anthony, Esquire, represented the Company; Natalie J. Moore, Esquire, represented the Consumer Advocate; Francis P. Mood, Esquire, represented AT&T; and Marsha A. Ward, Assistant General Counsel, represented the Commission Staff.

The Company presented Nancy H. Sims, Operations Manager-Rates and Regulatory Department to testify in support of the proposed changes. C. L. Payne, Segment Manager-Pricing, Bell South Services testified in rebuttal. The Consumer Advocate presented Allen G. Buckalew, an Economist with J. W. Wilson and Associates, Inc. to present its position in opposition to this matter. AT&T presented the testimony of Mike Guedel, Staff Manager-Marketing Plans Implementation to testify in opposition to the Company's proposed tariff. The Commission Staff presented the testimony of James M. McDaniel, Chief of Telecommunications Department of the Utilities Division,

to provide the Commission with Staff's position concerning Southern Bell's proposed changes in Touch-Tone Calling Service.

II.

DISCUSSION

Southern Bell's witness Sims testified that the purpose of her testimony was to support the Company's filing to allow Southern Bell to recover the revenues which Southern Bell alleges will be lost as a result of Commission Order No. 87-982 in Docket No. 87-29-C. Additionally, witness Sims explained Southern Bell's position regarding flexible pricing and banded rates. Witness Sims opined that Touch-Tone service is an optional service similar to such optional services as custom calling services, which are banded. Therefore, witness Sims asserted, the rationale utilized by the Commission for custom calling services should also apply to Touch-Tone service. Witness Sims testified that the Touch-Tone tariff proposes that the Commission approve a maximum and a minimum allowable rate, both being above relevant cost. Within this band of prices the Company is allowed, upon thirty (30) days notice to the Commission, to set prices in accordance with its market conditions. The proposed tariff increases the rate for residence Touch-Tone service from $1.00 to $1.25 and increased the business rate from $2.00 to $3.00. The minimum rate established for both business and residence is $1.00 and the maximum rate is $4.00. Southern Bell is not proposing an increase in the Touch-Tone rates for either PBX trunks or Centrex; however, minimum and maximum rates for these services are proposed to be the same as residence and business.

Witness Buckalew, for the Consumer Advocate, testified to the Company's revenue requirement and how that revenue requirement was to be collected. Witness Buckalew concluded that the revenue requirement proposed by Southern Bell was simply a forecast of what may happen and that, in his opinion, the loss has not been incurred. Witness Buckalew also disagreed with collecting the revenues from the Touch-Tone service because he believed Touch-Tone service has evolved over the years into a non-optional service in many cases.

AT&T witness Guedel testified that the proposed Southern Bell Touch-Tone tariff discriminates with respect to price in the provisions of monopoly service, *i.e.*, Touch-Tone, in favor of Southern Bell ESSX customers and to the detriment of PBX customers. Witness Guedel maintained that certain features included in the ESSX tariff are directly competitive with PBX systems. Witness Guedel also mentioned other services included in the ESSX tariff, one of which is Touch-Tone, that he asserted is clearly a monopoly offering. These monopoly services can only be provided by the local franchise companies. Mr. Guedel asserted that if the monopoly provider also competes in the market for intrasystem features and functions, the monopoly provider would certainly have opportunity to encourage potential customers to purchase competitive elements from it by offering substantial discounts on exchange monopoly services such as Touch-Tone. Mr. Guedel proposed that by applying the same rules, rates and structures to ESSX Network Access Registers (NARs) as are currently being proposed to PBX trunks, the alleged price discrimination problem would be eliminated.

On cross-examination Mr. Guedel brought out the fact that an ESSX customer can receive Touch-Tone at no charge and a PBX customer receives Touch-Tone at a charge of $3.00 per trunk. However, Mr. Guedel also admitted that the cost of Touch-Tone is built into the ESSX package rate with many different features built into it, Touch-Tone being just one. Mr. Guedel admitted that AT&T had done no studies to support the claim that Southern Bell's tariff discriminates against PBX customers.

Staff witness McDaniel testified that Touch-Tone calling service is less discretionary in comparison to other services which have been priced with banded rates, such as custom calling services. Mr. McDaniel testified that residential customers may be especially less likely to eliminate Touch-Tone calling services as the price for this service increases. Mr. McDaniel stated that this would be because of the customer's investment in Touch-Tone calling instruments. Witness McDaniel testified that most Touch-Tone equipment will not operate unless the customers subscribe to Touch-Tone calling service. Thus, the only way the customer could avoid Touch-Tone calling service increases would be by replacing or modifying their telephone equipment.

Company witness Payne gave rebuttal testimony concerning allegations made by Mr. Buckalew during his testimony in the proceeding. Specifically Witness Payne's testimony addressed Mr. Buckalew's allegations concerning revenue losses association with implementing the multi-jurisdictional WATS Access Lines in South Carolina.

III.

FINDINGS AND CONCLUSIONS

Based upon the Commission's consideration of testimony and evidence received during the hearing in this matter, the Commission herein makes the following determinations:

1. That the Company's proposal to increase Touch-Tone Service rate for residential customer's from $1.00 to $1.25 and to increase the business Touch-Tone Service rate from $2.00 to $3.00 should be approved.

2. That the Company's proposal of a minimum and maximum rate structure, *i.e.*, banded rates with a thirty (30) day notice period, should be denied.

3. AT&T's proposal to apply the same rules, rates and structure to ESSX NARs should be denied.

4. Based on the Commission's action herein the Consumer Advocate's Motion to dismiss filed prior to the hearing should be denied.

5. The rates approved herein should become effective for service rendered on or after February 15, 1988.

6. That the Company should file tariffs reflecting the findings herein within ten (10) days from the date of this Order.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

/s/ Henry G Clove
Acting Chairman

ATTEST:

/s/ Charles Falletions
Deputy Executive Director

(SEAL)

UNITED STATES CONSTITUTION Amend.XIV

§ 1. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM RICHLAND COUNTY
ERNEST KINARD, JR., JUDGE

Steven W. Hamm, Consumer Advocate
for the State of South Carolina,

Appellant,

vs.

Southern Bell Telephone and Telegraph Company
and The South Carolina Public Service Commission,

Respondents.

PETITION FOR REHEARING

OPINION NUMBER 23214
Filed May 7, 1990

NOW COMES the Respondent, Southern Bell Telephone and Telegraph Company, who would request respectfully that this Court stay its remittitur and grant this petition to rehear the decision of the Court in the above reference action, rendered in Opinion Number 23214, and filed May 7, 1990. Pursuant to Supreme Court Rule 17 the Respondent would assert respectfully that this Honorable Court overlooked or misapprehended the following points:

1. In finding that there was no evidence to support the opinion of Southern Bell's expert, Mr. Payne, other than a study which was not introduced into evidence, the Court overlooked or misapprehended the testimony and

factual bases found in the record at pages 50, line 12 – page 85, line 16, which include at a minimum the following facts:

* * *

first time that there was insufficient evidence in the record to form the basis of the expert's opinion is unfair to parties relying on the prior case law. What the Court now finds to be a fatal defect could have been cured easily if objection had been made timely. To allow the decision, *sub judice*, to stand, in essence creates a new rule of law which denies a litigant's procedural due process rights, resulting in the instant case in the possibility of confiscation of its property.

See: citations quoted at paragraph number 2, *infra*.

4. The study upon which Southern Bell's expert, Mr. Payne, based his opinion and the study in which he was involved (Tr. p. 81, lines 7-6)[3], need not have been introduced absent an objection from the Consumer Advocate that insufficient facts had been introduced into evidence upon which the opinion of the expert was based.

See: citations quoted at paragraph number 2, *infra*.

5. The Court overlooked the facts underlying its decision in *Parker v. South Carolina Public Service Commission*, 281 S.C. 215, 314 S.E.2d 597 (1984), wherein it was conceded in the record of that case that the witness for

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[3] Citations to the Transcript of Record relate to the line numbers actually contained therein. Typographical errors resulted in the nonsequential numbering of lines on certain pages thereof.

Duke Power Company had formulated his opinion solely on the basis of "very uninformed information". *Id.* at 598. The facts in that case are wholly unlike the testimony of the expert witness of Southern Bell in the case at bar. Further, in the case upon which the Court relied, Duke Power Company conceded in the record that there was no empirical basis

* * *

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-704

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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BEST AVAILABLE COPY

RESTATED QUESTION PRESENTED

When a state Supreme Court applies an existing evidentiary requirement in accordance with well-established state law on the application of evidentiary rules, is a litigant denied procedural due process under the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

In this case the South Carolina Supreme Court simply applied to the facts an evidentiary requirement already existing under South Carolina law. It correctly reversed South Carolina Circuit Court and South Carolina Public Service Commission (PSC) orders granting a Touch-Tone rate increase to Southern Bell Telephone and Telegraph Company (Petitioner). Petitioner had applied for the increase on September 17, 1987. The South Carolina Consumer Advocate (Respondent) intervened as a party of record. On January 13, 1988, the PSC held a hearing under the State's Administrative Procedures Act (APA) to consider the application. Petitioner offered one direct and one rebuttal witness in support of the increase. Respondent and Intervenor AT&T each offered a direct witness opposing it. Despite the scant evidence presented by Petitioner, however, the PSC issued its order on February 9, 1988, granting the proposed rate increase.

Petitioner based its proposed increase on a reallocation of future losses estimated to be sustained as a result of an earlier PSC ruling in another docket. The earlier ruling required all local exchange telephone companies to offer multi-jurisdictional WATS lines services as opposed to separate intrastate and

interstate WATS lines. The PSC order also provided that any local telephone companies that could demonstrate that they sustained a revenue deficiency as a result of this decision could seek approval of rate increases to offset the deficiency. In its order the PSC did not conclude, however, that any company, including Petitioner, would necessarily suffer any revenue deficiency, and no party appealed that order.

Based upon the PSC's initial WATS order, Petitioner applied for an increase in its Touch-Tone rates. In support of its application at the evidentiary hearing before the PSC, Petitioner attempted to meet its burden of proving the justness and reasonableness of its request by first sponsoring a direct witness who testified in support of the increase by referring to estimated revenue losses due to the PSC's earlier WATS order. The witness of Respondent Consumer Advocate testified that the increase was inappropriate, because it was based on speculation and unreliable estimates, and the AT&T witness stated the request was inherently discriminatory. The rebuttal witness of Petitioner then testified in an attempt to refute the Consumer Advocate witness's testimony and referred to a study to support his opinion as to the amount of these estimates, but neither Petitioner nor its rebuttal witness attempted to introduce the

study into the record. The PSC nevertheless granted the increase, and Respondent challenged that decision. Respondent thereafter appealed the circuit court's affirmation of the PSC's order in the South Carolina Supreme Court.

On May 7, 1990, the South Carolina Supreme Court reversed the circuit court and PSC. It concluded that the PSC's decision granting the Petitioner's rate increase request was not based on evidence of record by applying its long-standing substantial evidence rule in the South Carolina Administrative Procedures Act (§1-23-380(g)(5)) and by applying it in a manner consistent with several previous decisions. *Parker v. South Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 314 S.E.2d 597 (1984); *Parker v. South Carolina Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E.2d 403 (1986); *Hamm v. South Carolin Pub. Serv. Comm'n and Piedmont Natural Gas Co. Inc.*, 295 S.C. 429, 368 S.E.2d 911 (1988); *Piedmont Natural Gas Co., Inc. v. Hamm*, S.C. , 389 S.E.2d 655 (1990); *Hamm v. Central States Health & Life Co.*, 292 S.C. 408, 357 S.E.2d 5 (1987); and *Hamm v. Central States Health & Life Co.*, 299 S.C. 500, 386 S.E.2d 250 (1989). It reversed the lower court without remanding the case (App. at 8(a)), since it had reviewed the record in reaching its conclusion and determined a remand would be

inappropriate and unnecessary due to both the lack of evidence and state precedent not allowing an applicant two bites at the apple to meet its burden of proof. Petitioner then filed a Petition for Rehearing, which the Court denied on August 1, 1990. Thereafter, on October 30, 1990, Petitioner filed its Petition for a Writ of Certiorari with the Court.

Even though the filing of the Petition for a Writ of Certiorari would usually suggest that the instant case has been concluded, it has not. Petitioner is continuing to avoid making refunds to customers by challenging in state court whether the Supreme Court really intended for refunds to be returned to customers. It recently prevailed in the lower court; therefore, on December 20, 1990, Respondent and the PSC filed a joint Notice of Appeal in the South Carolina Supreme Court.

SUMMARY OF ARGUMENT

The case before the Court concerns matters of state law concerning the substantial evidence rule and its application. Petitioner is trying to make a federal constitutional case out of a state law case in which the South Carolina Supreme Court upheld its well-applied substantial evidence rule. The Supreme Court also refused to remand the case, since there was no evidence of record and an applicant for a rate increase is not

entitled to two bites at the apple in proving its case.

Petitioner is contending as a matter of constitutional law that a new evidentiary rule, not itself challenged, was improperly applied to it in this case. Carrying this argument to its logical conclusion, however, would require continual relitigation of state cases whenever the issue is an applicant's failure to present enough evidence to support its rate proposals.

Neither party disputes that Petitioner had the burden of proving the reasonableness of its Touch-Tone rate increase. Under the State's APA an administrative regulatory decision in a contested case such as the instant one must be based on substantial evidence of record. Case law under the substantial evidence rule has developed since 1977 when the APA was enacted in South Carolina which requires that the underlying facts supporting a witness's opinion about a disputed issue must be in the record.

This Court should deny the Petition, because the South Carolina Supreme Court correctly and consistently applied the substantial evidence rule in the instant case and cited for support *Parker v. South Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 314 S.E.2d 597 (1984)(*Parker I*). Petitioner fails to cite the subsequent case involving this same factual situation, same

parties, and same issues. In *Parker v. South Carolina Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E. 2d 403 (1986) (*Parker II*), the Court reiterated that in *Parker I* it had determined that Duke Power Company was not entitled to attempt to cure its failure to meet its burden of proof by introducing studies into the record in a later proceeding to support its request for a change in nuclear depreciation rates after reversal by the Supreme Court. It was not, in other words, entitled to two bites at the apple in attempting to prove its case. In addition to its strained construction of *Parker I* and its total failure to advise the Court of *Parker II*, Petitioner also ignores at least two other South Carolina Supreme Court cases decided before the instant case which demonstrate that the state court applied the same evidentiary rule in a like manner.

Finally, the only case cited by Petitioner to support its novel procedural due process argument is a case involving retroactive application of a criminal trespass statute. *Bouie v. City of Columbia*, 278 U.S. 347 (1964). The *Bouie* case is inapplicable to this case, however, since the substantial evidence rule was properly applied. *Bouie* is easily distinguishable because it involved review of a criminal statute in which this Court applied the more stringent substantive and procedural

due process requirements that the statute under review must itself give fair warning of the conduct that it constitutes a crime. *Id.* at 350.

The pending case, on the other hand, is a civil case involving having an adequate opportunity to meet existing burden of proof requirements. Not only did Petitioner have one opportunity in this case to meet its burden of proof, it is still seeking to keep the benefits of this unlawful increase in a later stage of this very case. It also has the right to seek Touch-Tone increases in the future. Petitioner's rights have been protected in accordance with previous state Supreme Court decisions.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

THE EVIDENTIARY REQUIREMENT THAT A STATE REGULATORY AGENCY'S DECISION MUST BE BASED ON SUBSTANTIAL EVIDENCE ON THE RECORD HAS PREVIOUSLY BEEN ESTABLISHED UNDER SOUTH CAROLINA LAW.

The South Carolina Supreme Court has consistently held that administrative findings must be supported by substantial evidence. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E. 2d 304 (1981) and *Parker I*, *supra*. In addition, the law is clear that the utility, as an applicant, bears the burden of providing informa-

tion showing the reasonableness of its request before a state regulatory commission. 64 Am. Jur. 2d *Public Utilities* § 271 (1972) and *City of Akron v. Public Utilities Commission*, 55 Ohio St. 2d 155, 278 N.E. 2d 480 (1978). In the instant case, then, Petitioner had the burden of applying to the PSC for a Touch-Tone rate adjustment and justifying why ratepayers should have to bear the increase. Contrary to Petitioner's claims, the state court established no new evidentiary rule that was retroactively applied to Petitioner, as will be demonstrated below.

In 1977 the South Carolina General Assembly enacted the Administrative Procedures Act. S.C. CODE ANN. §1-23-10 *et seq*. (Law Co-op. 1976). Section 1-23-380 (g) states in part that an administrative agency's decision may be reversed or modified if its findings are not based on "substantial evidence on the whole record." S.C. CODE ANN. §1-23-380(g)(5). In 1981 the South Carolina Supreme Court in *Lark*, *supra*, stated that substantial evidence "is not a mere scintilla of evidence...but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." 276 S.E.2d at 306 (citing *Consolo v. Federal*

Maritime Commission, 383 U.S. 607, 620 (1966)). Several cases discussed below further clarify this principle of "substantial evidence on the whole record."

In footnote 3 at 5-6, Petitioner asserts that the South Carolina Supreme Court incorrectly cited *Parker I*, *supra*, as precedent for its ruling in the instant case. Petitioner is mistaken. According to the state court in *Parker I*,

> (T)he record in this case is, to say the least, inadequate to form the basis of an assessment of the factors necessary for a determination of a depreciation rate....Since there is no adequate factual basis for the 4% depreciation rate, the finding of the Commission in that respect is reversed.

314 S.E.2d at 599. In that case before the PSC, the applicant Duke Power Company had not made specific reference to any particular study to support its request to change its nuclear depreciation rate from 3.57% to 4.0%. However, on remand to the PSC Duke succeeded in convincing the PSC that it should construe *Parker I* to allow Duke to introduce studies into the record on remand that existed at the time of the initial proceeding but had not been referenced or introduced.

The Consumer Advocate vigorously protested that the PSC was restricted to evidence already on the record under *Parker I* or else Duke would improperly be allowed two bites at the apple -- two opportunities to meet its burden of proving

material, disputed issues that might very well thwart the Consumer Advocate's efforts to prevail on legal issues in court on behalf of the public. In *Parker II*, *supra*, the South Carolina Supreme Court agreed by stating, "unless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple. It was improper for the Commission to consider additional evidence." 342 S.E.2d at 405.

Petitioner next asserts that under the pre-APA decision of *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E. 2d 671 (S.C. 1978) the factual underlying basis "must be *identified in* the record." Petition at 6 (Emphasis added). This is a misinterpretation of *Young*. The South Carolina Court in *Parker I* itself correctly cites *Young* as requiring an opinion to be supported by an "evidentiary showing." 314 S.E. 2d at 599. Essentially, the state APA codified this as requiring substantial evidence "on" the record rather than merely "identified in" the record as alleged by Petitioner.

In *Young* the South Carolina Supreme Court reversed the lower court's decision due, in part, to its reliance on opinion testimony of a witness. Instead of standing for the simple proposition cited by Petitioner from *Young* that the expert need not "set forth his calculations or detail the scientific or profes-

sional knowledge leading to his conclusions'' (Petition at 6; 242 S.E.2d at 678), the state court related this statement to facts that would not be understood by the jury. *Id.* Moreover, in rejecting the lower court's holding, the court continued,

> Neither should it be implied, however, that the complexity of the expert's area of knowledge relieves him of establishing, before the jury, the underlying basis for his opinion. However complex or esoteric the specialized knowledge the expert draws upon, he must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried which was necessary to the formation of an intelligent opinion.
>
> * * *
>
> ...(D)espite Fowler's testimony that he could have mathematically rated each of the 'dominoes' as to its potential for danger, he made no attempt to ascertain the nature and extent ofthe operative, dynamic forces, nor did he attempt to scientifically determine the contribution, if any, of the individual 'dominoes' to ejection. Not having done so, it was impossible for Fowler to say with any reasonable degree of accuracy that the dynamic forces attributable to the alleged defects contributed to Young's ejection [from the boat in the accident] to the extent that ejection would not have occurred in the absence of the alleged defects.
>
> Having failed to establish an underlying factual basis taking into consideration the material facts necessary to the formation of an intelligent opinion, Fowler's testimony on causation is devoid of probative value and cannot support a verdict.

Id. at 678-9.

In the instant case, the underlying factual methodology was of crucial significance. Petitioner and Respondent both

presented testimony on the same issue and reached different conclusions. The PSC has been cited as the regulatory expert and, as such, has been held to a heightened duty to explain itself in addressing complex matters. *Hamm v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 309, 380 S.E.2d 428 (1989). Petitioner's failure to offer any testimony with probative value made unnecessary a remand simply for more explicit findings. *Young* suggests that the underlying methodology, if credible, would have constituted substantial evidence. However, no underlying methodology was in the record. The South Carolina Supreme Court correctly cited *Parker I*, which in turn cited *Young*, for the proposition that an "evidentiary showing" was necessary. *Parker I*, 314 S.E. 2d at 599.

The instant case is also easily distinguishable from the lower appellate court decision of *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986). Petition at 6-8. Petitioner incorrectly cites *Howle* to suggest that "the evidence of interest is the opinion testimony, not the outside material." *Id.* at 7. It is true that for the first time in *Howle* the state court of appeals held that an appropriately qualified psychologist could testify as to diagnosis, prognosis, and causation of mental and emotional disturbance. 344 S.E.2d at 161. The appellate

court explained, however, that it was allowing this expert opinion testimony, based partially on information received from others, because: (1) the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" (*Id.* at 162 (Citations omitted)) and (2) the information received "was not being offered for the truth of the matters asserted therein; rather it was merely mentioned as one of the bases of Bixler's diagnosis." *Id.*

Factors distinguishing *Howle* from this case include: (1) the failure to have Petitioner's witness specifically qualified as an expert; (2) competing testimony on the same issue reaching opposite conclusions; (3) the fact that the underlying factual evidence was available to Petitioner and only subject to discovery by Respondent rather than "of a type reasonably relied upon"; (4) even if the information would have otherwise qualified to be of this type, Petitioner made no showing to this effect; and (5) the opinion testimony of Petitioner's witness was offered to establish the truth of the matters asserted.

This Court should find Respondent's argument persuasive, especially given the state court of appeals' own application of *Howle*. In *Campbell v. Paschal*, 290 S.C. 1, 347 S.E.2d 892

(Ct. App. 1986), the appellate court cited *Howle* for the principle of allowing expert testimony based partially on information received from other sources if such facts and data are "of a type reasonable relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* at 901. However, rather than information uniquely available only to one party, the appellate court instead upheld use of opinion testimony to project economic loss partially based on economic and statistical data of the kind relied on by economists seeking to project economic loss. In that case the information consisted of such things as "work life expectancies, wage growth rates, interest rate trends, income tax rates, and the like" from government documents which "originated with the United States Department of Labor, the Internal Revenue Service, the South Carolina Employment Security Commission, the Veteran's Administration, and the Federal Reserve System." *Id.* This type of information is obviously of a different category of more readily available data rather than data based only on Petitioner's subscribers' predicted usage patterns and other unknown assumptions. In fact, in *Campbell*, the trial judge took notice that the government publications "are accurate." *Id.* In short, both

Howle and *Campbell* are consistent with the *Parker* line of cases.

Petitioner places undue reliance on the state court's reference to the "study" mentioned by Petitioner's witness at the administrative proceeding. Petition at 5,7-8; App. at 8a. Contrary to Petitioner's claims, *Parker I* and *Parker II* each demonstrate that the fundamental principle followed in the instant case was that the evidence supporting a request must not simply be conclusory opinion but must consist of sufficient, credible factual information "on" the record.

Through its reversal in the instant case, the state court properly determined that Petitioner's request was not based on substantial evidence of record. By noting that the "study" was not introduced into evidence, the court stated it was unnecessary simply to remand the case for the PSC to attempt to articulate its findings (also alleged by Respondent to be inadequate). The Court did not state that introduction of the "study" in itself would have cured the inadequacy of the evidence to support the Touch-Tone rate application. It simply determined that remanding the matter for the PSC to set forth more explicit findings required under S.C. Code Ann. §1-23-350 would obviously only waste time given the lack of evidence on the

record. The Touch-Tone increase request was, therefore, obviously viewed by the court as requiring underlying facts, given applicable South Carolina case law; APA evidentiary requirements; the complex mathematical nature of the matter to be proved; and contradictory opinions of witnesses as to the truth of the matter asserted.

At least two other cases decided prior to the instant case provide additional support for the argument that the state court has simply followed a previously existing evidentiary rule herein. In *Hamm v. Central States Health & Life, Co.*, 292 S.C. 408, 357 S.E.2d 5 (1987)(*Central States I*), the South Carolina Supreme Court reversed the portion of the Chief Insurance Commissioner's administrative order granting a health insurance increase based on a "medical intensity" factor. The company's witness had given his opinion as to the appropriateness of the increase attributable to this factor and had introduced the results of a study published several years earlier to support his opinion. 357 S.E.2d at 5-6. However, the court adopted the Consumer Advocate's argument that "(n)o substantial evidence was presented by Central States as to the current impact of 'medical intensity'". *Id.* at 6. The court continued by stating that the Insurance Department witness's testimony that he could

not say exactly how the intensity level had changed since 1981 rendered his opinion without probative value,

> since there was no evidentiary showing of the facts upon which his opinion was predicated. *See Parker v. South Carolina Public Service Commission*, 281 S.C. 215, 314 S.E.2d 597 (1984), *modified*, 288 S.C. 304, 342 S.E.2d 402 1980).

357 S.E.2d at 6. In light of the reference by the court in *Central States I* to its modification of *Parker I* in *Parker II*, it is clear that the court was apprising regulated utilities and insurance companies that rate increase requests must be based on evidence with underlying facts in the record and that failure to do so would render any resulting rate approved by the PSC unlawful and subject to refund from the date of approval.

The state court also followed this evidentiary approach in evaluating the burden of proof standard in *Piedmont Natural Gas Co., Inc. v. Hamm*, S.C. , 389 S.E.2d 655 (1990)(*Piedmont II*). In *Piedmont II*, also decided prior to the instant case on February 20, 1990, the South Carolina Supreme Court reversed the circuit court order requiring the PSC to reopen the evidentiary record to allow Piedmont to introduce additional evidence it had failed to introduce at the administrative hearing.

On remand from the state Supreme Court[1] the PSC had followed the ruling of that court reversing its first order which granted an increase in natural gas rates, based in part on retention factors a Piedmont and PSC Staff witness contended were appropriate. In *Piedmont II* the Supreme Court cited *Parker I* for the proposition that Duke's nuclear depreciation rate of 4% had "no evidentiary support" and therefore violated the substantial evidence rule. 389 S.E.2d at 657. It then "reversed" the case and cited *Parker II* as to the application of the evidentiary rule therein to mean that no new hearing was appropriate for the admission of additional evidence and that refunds were necessary from the date of approval of the unlawful rate established by the PSC. *Id.*

All of these cases show that the South Carolina Supreme Court had ample precedent to apply in reaching its decision in the instant case. The Petitioner had the burden of proving the reasonableness of its Touch-Tone rate increase and failed to do so. It is not entitled to more than one opportunity to prove its case. The Court should, therefore, deny the Petition.

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[1] *Hamm v. South Carolina Pub. Serv. Comm'n and Piedmont Natural Gas Co., Inc.*, 295 S.C. 429, 368 S.E.2d 911 (1988) (*Piedmont I*)(remanding rate case to PSC to "substantiate the record and include in its order the basis for the adoption and approval of the use of retention factors.")

II.

THE SOUTH CAROLINA SUPREME COURT CORRECTLY AND CONSISTENTLY APPLIED SOUTH CAROLINA LAW IN REVERSING THE SOUTH CAROLINA CIRCUIT COURT AND PUBLIC SERVICE COMMISSION, AS WELL AS IN DENYING SOUTHERN BELL'S SUBSEQUENT PETITION FOR REHEARING.

Assuming for purposes of argument that the references to the "study" established some new substantial evidence rule, its application would still be sound under *Parker II* and subsequent case law. Petitioner concedes it is not challenging the wisdom of the rule, only its application. Petition at 6 and n. 8 at 11-12. Yet it has overlooked *Parker II* not only as to the earlier viability of the evidentiary rule itself but also as to the application of procedural due process requirements and instead cites only the criminal case of *Bouie v. City of Columbia*, 378 U.S. 355 (1964) to support its novel constitutional argument.

Aside from the consistent substantial evidence rule endorsed, the South Carolina Supreme Court in *Parker II* made it abundantly clear that a PSC order it ultimately reverses is unlawful and refunds or credits with interest are to be awarded to ratepayers from the time of the appeal on the successfully challenged issues. As the Court noted in *Parker II*:

> Due to Duke's failure to present adequate evidence, the 3.57% depreciation rate remained in effect. We must, therefore, determine the appropriate time period for

> which refunds, credits or other rate adjustments are due. Ratemaking is a prospective process, not a retroactive one. *South Carolina Electric and Gas Co. v. Public Service Commission*, 275 S.C. 487, 272 S.E.2d 793 (1980). Any rate increases must be applied prospectively. Duke cannot be permitted to increase its rates in October 1979 based on evidence that was not presented until almost five years later [in a subsequent rate case docket not on appeal]. Until an adequate evidentiary basis was established to support an increase, the 3.57% rate should have remained in effect.
>
> * * *
>
> On remand, the Commission is ordered to authorize a 3.57% nuclear depreciation rate for Duke from October 1, 1979 through January 27, 1981. It was not until the Commission issued a subsequent unappealed order on January 28, 1981 that the 4% nuclear depreciation rate became effective. The Commission is required to order Duke to make the appropriate refunds or adjustments in rates reflecting the same.

342 S.E.2d at 405-6.

From this excerpt from *Parker II*, it is readily apparent that the South Carolina Supreme Court has previously determined that if an applicant fails to meet its burden of proof to justify a rate increase, procedural due process requirements do not mandate that the utility retroactively gets a second chance to meet its burden. The court ordered refunds from the date of the Consumer Advocate's appeal of the PSC order, even though no stay of the PSC order had been sought, since the court had found the rate to have been unlawful. *Id.* at 405-6. If the court had failed to provide the Consumer Advocate and ratepayers relief

from the date of approval of a rate found to have been unlawful, it would have violated both their procedural and substantive due process rights, not Petitioner's.

Therefore, even if this Court disagrees with Respondent's argument that no new rule was established in the instant case, the Court should still deny the Petition, because there was no denial of procedural due process due to its retroactive application. It would only have been improperly and retroactively applied if the state court had, for example, attempted to require a refund of an earlier, lawful Touch-Tone rate increase granted by the PSC that was not on appeal. *See South Carolina Electric and Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980).

In the *Bouie* case cited by Petitioner, minority sit-in demonstrators were abruptly confronted with a "No Trespassing" sign stretched across the lunch counter after their arrival at an Eckerd's Drugstore in Columbia. They were given no notice that their conduct of sitting quietly thereafter at the counter would be considered violative of the statute. With criminal liability at issue, this Court properly held as violative of the defendants' substantive and procedural due process rights the retroactive application of a new judicial construction of a

criminal trepass statute. 378 U.S. at 350-1.

Petitioner cites *Bouie* in which this Court quotes *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-8 (1930), to support its argument that criminal due process requirements have been extended to civil cases such as the case before the Court. However, contrary to Petitioner's claim that *Brinkerhoff-Faris Trust & Savings Co.* supports its due process position, this Court stated:

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

281 U.S. at 680 (Footnotes omitted). Therefore, even if one concedes the Supreme Court of South Carolina rendered an erroneous decision on state law or overruled a principle or doctrine established by previous decision on which Petitioner relied, this does not give rise to a Fourteenth Amendment claim or otherwise confer jurisdiction on this Court. Furthermore, in the case *sub judice* Petitioner has not alleged any substantive due process violation and, in fact, is still trying to avoid

returning funds to ratepayers in the instant case now pending before the South Carolina Supreme Court.[2]

Given the *Parker I* and *II* decisions, the *Central States I* decision, and the *Piedmont I* and *II* decisions discussed thus far, it is clear that Petitioner is attempting to mislead this Court by even filing this Petition for Writ. Together these decisions clearly demonstrate that Petitioner's reliance on *Bouie* and *Brinkerhoff-Faris* is misplaced and that the Petition should be denied. However, at least one additional case makes clear that the South Carolina Supreme Court has not violated any of Petitioner's procedural due process rights.

The instant case was heard by the South Carolina Supreme Court on January 22, 1990; on October 30, 1989, the South Carolina Supreme Court had handed down another applicable decision, *Hamm v. Central States Health and Life, Co.*, 299 S.C. 500, 386 S.E.2d 250 (1989)(*Central States II*). In *Central States II* the state court heard the Consumer Advocate's

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Petitioner's theory is that since the Supreme Court "reversed" the case instead of using the phraseology "reversed and remanded", consumers are not entitled to refunds. However, it should be noted that the Supreme Court used the same terminology in *Piedmont II* (389 S.E.2d at 657) and consumers received refunds calculated from the date of the unlawful increase previously granted by the PSC.

appeal after reversal and remand by the court of the Chief Insurance Commissioner's granting of an increase based in part on a "medical intensity" factor for which no substantial evidence had been presented on the record. *See*, *infra*, at 16. At issue were: (1) the legality of the Commissioner's order on remand that failed to provide for refunds from the date of the increase previously found by the court to have been unlawful and (2) the authority of the Commissioner to order health insurance refunds.

In this second appeal involving the same rate increase application, the South Carolina Supreme Court reversed both the circuit court's affirmation of the Commissioner's order on remand and the Commissioner's order. The court found the Commissioner did, indeed, have authority to order refunds. 386 S.E.2d at 252-3. The court also expressly rejected the argument of Central States that *SCE&G*, *supra*, supported its position that requiring refunds from the date of the increase order, albeit found to have been unlawful, would amount to retroactive ratemaking. According to the court,

> *SCE&G* is easily distinguished from the present case. In *SCE&G*, we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct

> refunds in *SCE&G*, would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful*. As such, a refund in this instance would not be considered retroactive ratemaking.
>
> * * *
>
> ...[I]n the situation before us, the Commissioner would not be engaging in retroactive ratemaking by ordering refunds where the approved rates were appealed and found to be unlawfully established.
>
> Finally, Central States submits that the *Parker* cases are inapplicable to this case because the statutory authority and specific powers of the PSC are different from the powers held by the Commissioner. This argument is without merit. While we acknowledge that the powers held by the PSC and the Commissioner are different, the same logic and principles of the *Parker* cases apply here. That is, when a regulated company requests a rate increase which is approved by the regulating authority, but timely appealed and found to be unlawfully established, that company cannot keep funds to which it was never entitled. This is a matter of public policy and such reasoning would apply no matter what regulated industry is involved.

386 S.E.2d at 253-4 (Emphasis in original). The *Central States II* holding provides conclusive support for Respondent's argument that this Court should deny the Petition. In *Central States II* the state court went so far as to cite the *Parker* cases discussed herein and apply them there as it has done in the instant case. Moreover, in the instant case, Petitioner has not even contested the PSC's authority to order refunds. This case, therefore, clearly does not warrant review by this Court.

CONCLUSION

The cases cited herein to support Respondent's opposition to the Petition demonstrate that the South Carolina Supreme Court in the instant case has properly and consistently applied the substantial evidence rule. There was no new evidentiary rule established and it was not applied retroactively to Petitioner. Petitioner simply failed to meet its burden of proving the reasonableness of its Touch-Tone rate increase. For these reasons, and for the other reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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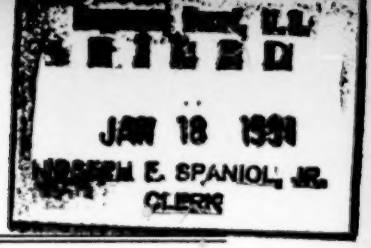

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITIONER'S REPLY BRIEF

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STATEMENT

Respondent's brief fails to address the question concerning expert testimony presented by petitioner for review by the Court. Instead, respondent has focused on an entirely different question, relating to the "substantial evidence" rule, which is not implicated in the Petition for Certiorari. The Brief in Opposition has, accordingly, not diminished the basis for granting Certiorari presented in the Petition.

ARGUMENT

Respondent has totally and completely missed the point of the Petition for Certiorari. It is Petitioner's contention that its right to procedural due process under the Fourteenth Amendment was abridged by the South Carolina Supreme Court's heretofore non-existent requirement that the outside materials or studies relied upon by an expert in the course of his testimony be introduced into evidence. Inexplicably, Respondent elected to argue in support of the state supreme court's decision on an evidentiary point not even raised by the petition. Although the entire thrust of Petitioner's Brief was directed toward the evidentiary rule relating to testimony by expert witnesses, Respondent has not addressed this issue at all, but instead argued that the State Supreme Court had correctly applied the substantial evidence rule, which is not the question presented. In the first sentence of its statement of the case, Respondent's assertion that the State Supreme Court "simply applied to the facts an

evidentiary requirement already existing under the South Carolina law", simply begs the question at hand.

While the substantial evidence rule may be implicated in appellate review of state agency decisions, it is not at all relevant to the procedural due process question presented by Petitioner herein. As set forth in the Petition for Certiorari, the issue requiring the Court's attention is the due process denial wrought upon Petitioner by the South Carolina Supreme Court's departure from the evidentiary rule relative to expert opinion, and the creation of a wholly new rule which it applied against Petitioner, without any notice or possibility of compliance. This in itself is a denial of Petitioner's right to due process, since litigants are entitled to have decisions, even in state court cases, rendered by processes that are fair. The manner in which the rules of evidence were changed in this case can hardly be considered the product of a fair process. Consequently, Petitioner was denied its right to procedural due process.

CONCLUSION

This case simply does not implicate the "substantial evidence" rule, which involves the degree of proof required to sustain a factual finding by a state administrative agency. Rather, here we are challenging the rule which serves as the foundation of the requirement for the admissibility of expert testimony with probative value. In effect, Respondent has presented no opposition to the Petition for Certiorari, and has, indeed, not stated any cogent, reasonable basis to deny the Petition.

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